Nos. 06-1195, 06-1196

In the

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS v. GEORGE W. BUSH, ET AL., RESPONDENTS.	KHALED AL ODAH, ET AL., PETITIONERS, v. UNITED STATES, ET AL., RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF SALIM HAMDAN AS *AMICUS CURIAE*

NEAL K. KATYAL
Counsel of Record
JUSTIN FLORENCE
600 New Jersey Ave., NW
Washington, D.C. 20001
(202) 662-9000

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
ERIC S. MERRIFIELD
Perkins Coie LLP

LAURENCE H. TRIBE
KEVIN K. RUSSELL
Harvard Law School
Supreme Court Litigation Clinic

LT. CMDR. CHARLES SWIFT
Office of Military Commissions

Attorneys for Salim Hamdan

Date: August 24, 2007

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INTEREST OF *AMICUS CURIAE*[1]

Salim Ahmed Hamdan, the Petitioner in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), has been detained along with the Petitioners in *Boumediene* and *Al Odah* (collectively, "*Boumediene*"), at the Guantanamo Bay Naval Base and deemed an "enemy combatant." However, Hamdan has additionally been charged with "Conspiracy" and "Providing Material Support for Terrorism" and slated for trial before a military commission. Hamdan submits this *amicus curiae* brief to explain why he and others charged before military commissions are on a different footing than those detained and why he and others similarly situated must have access to the writ of *habeas corpus* to challenge those proceedings on a pre-trial basis. Due to the interrelationship of this issue with the questions presented in *Boumediene*, Hamdan has asked this Court to grant his Petition for Certiorari Before Judgment. At a minimum, Hamdan asks this Court to render a decision in *Boumediene* that makes clear that he and others facing trial by a commission retain the right to pre-trial habeas found in Hamdan's previous case before this Court.

In *Hamdan v. Rumsfeld*, this Court ruled that Hamdan could not be tried by military commission because his trial violated both the Uniform Code of Military Justice and the Geneva Conventions. This Court held that both sources of law protected Hamdan and enforced these protections against the respondents, which included the Secretary of Defense and the President. On remand from this Court, the district court interpreted section 7 of the intervening Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (the "MCA"), to require dismissal of Hamdan's habeas petition. Hamdan's appeal from the district court's decision is pending in the D.C. Circuit. The Circuit Court has issued an order staying *en banc* consideration of Hamdan's case pending this Court's decision in *Boumediene*. *See Hamdan v.*

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[1] In accordance with the Court's Rule 37, Hamdan has received written consent of counsel for all parties to file this brief as *amicus curiae*. The Consents have been or will be filed with the clerk. No counsel for a party authored this brief in whole or in part or made monetary contribution to the preparation or submission of this brief.

Gates, No. 07-5042 (D.C. Cir. July 24, 2007) (per curiam order). Hamdan and the approximately 75 detainees that the Government currently intends to try in commissions therefore have the most profound interests in the outcome of this case.

SUMMARY OF ARGUMENT

The questions presented by *Boumediene* implicate some of the same issues Hamdan has raised in his habeas petition. Specifically, both cases question whether the MCA's jurisdiction-stripping provision applies retroactively to habeas petitions pending at the time of passage. Moreover, both challenge the Government's position that neither Petitioners nor Hamdan are entitled to the protection of the Suspension Clause and constitutional habeas because of their status as alleged alien enemies held outside of the United States.

There is, however, a fundamental distinction between the cases currently before this Court and Hamdan's pending case before the court of appeals. While the *Boumediene* Petitioners challenge their indefinite detention and the CSRT procedures used by the Government to justify that detention, Hamdan raises a pre-trial challenge to the legality of the military commission slated to try him for alleged war crimes.[2]

Although Hamdan agrees with Petitioners' argument that the territorial ambit of the Great Writ reaches those detained at Guantanamo, he submits this *amicus* brief to explain how his case differs from those currently before the Court and why this Court should resolve *Boumediene* in a manner that protects Hamdan's pre-trial access, and that of other commission defendants, to the writ. Because the questions in *Boumediene* are so closely related to those raised by Hamdan, he has asked this Court to grant his petition for a Writ of Certiorari Before Judgment and consider these cases together. Pet. Cert. Before J., *Hamdan v. Gates* (No. 07-15) (filed July 2, 2007).

As explained below, the habeas right to challenge an unlawful trial is included within the right to challenge executive detention.

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[2] *Al Odah* petitioner Omar Khadr has been charged under the MCA, but the *Al Odah* and *Boumediene* appeals concentrate on the legitimacy of the CSRTs as a basis for non-commission Petitioners' continuing detention.

Moreover, the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ("DTA") appear to allow for a far more limited judicial review of commissions than CSRTs. Accordingly, if this Court does not grant Hamdan's Petition for Certiorari Before Judgment, then he respectfully asks that this Court use *Boumediene* to make clear that if Petitioners have access to the Great Writ then, *a fortiori*, so too does Hamdan and any other defendant facing trial and punishment by a novel and untested military commission. Indeed, the Government has conceded as much. *See* Br. for Respondents in Opposition to Cert., *Hamdan v. Gates*, No. 07-15, at 12 ("If this Court holds in *Boumediene* and *Al Odah* that enemy combatants at Guantanamo Bay may petition for *habeas corpus* . . . there is no reason to suppose that its holding would not apply to those enemy combatants who have been designated for trial by military commission.").

Should the Court conclude, however, that the *Boumediene* Petitioners do not now have access to the writ, Hamdan asks that the Court make clear that the ruling does not prejudice his separate appeal arguing for the right to bring a pre-trial challenge to the military commissions based on the fact that such challenges lie at the core of traditional habeas jurisprudence and that the MCA fails to provide an adequate alternative for habeas review of the commissions.

ARGUMENT

I. Military Commission Challenges Under the Great Writ Differ Significantly from Detention Challenges

The challenge brought by Hamdan differs in important respects from the challenges brought by Petitioners to their detention. First, while each challenges a portion of the statutory framework established by the MCA and the DTA, the cases implicate different statutory provisions and legal concepts. Thus, while the analytical framework surrounding the Suspension Clause claims in each case is similar, the legal analysis will necessarily diverge. Moreover, the well-recognized conceptual difference between detention on the one hand, and criminal prosecution and punishment on the other hand, distinguishes the two challenges

and suggests that, whatever the scope of habeas may be to challenge detention, challenges to commissions present a far simpler case for this Court to resolve.

A. The Instant Case and Hamdan's Case Implicate Different Statutes and Require Separate Analyses

Once aliens are detained at Guantanamo, they are subject to the Combatant Status Review Tribunal ("CSRT") process that was put into effect after this Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Because Petitioners here seek the writ of *habeas corpus* on the grounds that their indefinite detention without charge is unlawful, *Boumediene* Cert. Pet. at 6, the CSRT procedures are the focus of their argument. Putting aside their arguments on the retroactivity of the MCA and the geographical reach of habeas, Petitioners' Suspension Clause argument focuses on the legal aspects of *detention*. Accordingly, Petitioners argue that the CSRT process and the attendant review procedures set forth in section 1005(e)(2) of the DTA are an insufficient substitute for robust habeas review. *Boumediene* Pet. at 18-21.

By contrast, Hamdan challenges the legality and jurisdiction of the military commission set to try him for offenses under the laws of war. Thus, while Petitioners challenge the part of the DTA/MCA scheme dealing with indefinite detention, Hamdan challenges the second part of that legislative framework, the authorization of a military commission process to try and convict non-citizen detainees. In explaining why the CSRT procedures were an inadequate substitute for habeas review of detention in this very case, Judge Rogers recognized this operative distinction and noted that the answer to the question may depend on whether the petitioners were challenging only their detention or were facing "imminent trial." *Boumediene v. Bush*, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, J., dissenting).

Under the MCA, alien detainees designated as "unlawful enemy combatants" by a CSRT may be subject to trial by commission. If the Government does choose to prosecute, the CSRT determination as to "unlawful enemy combatant" status is "dispositive for purposes of jurisdiction for trial by military commission." MCA § 3(a) (adding 10 U.S.C. § 948(c), (d)). The

MCA likewise only allows for narrow, *post hoc* review of commission final decisions by the D.C. Circuit, which can only consider "whether the final decision was consistent with the standards and procedures specified" by the MCA, not whether those standards and procedures are consistent with federal law and the Constitution. MCA § 3(a) (adding 10 U.S.C. § 950(g)). The MCA makes no provision for challenging whether the commission's procedures themselves are legal. Nor is there provision for review of factual conclusions; rather, "the Court of Appeals may act only with respect to matters of law." *Id.* Thus, *Boumediene*'s review of DTA section 1005(e)(2) will not answer the question of whether MCA section 3 provides a sufficient substitute for a habeas challenge to the legality of the military commissions.

B. Individuals Charged Before Commissions Have a Stronger Case for Habeas Than Those Being Detained

This Court and others have long distinguished between individuals objecting to detention and those challenging trials by untested military commissions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) ("Hamdan does not challenge, and we do not today address, the Government's power to detain him"); *id.* at 2817 (Scalia, J., dissenting) ("The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention' such as the terms and conditions of confinement."); *see In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005) (distinguishing between the "legality of military commission proceedings" and "the rights of detainees with respect to their classifications as 'enemy combatants'"), *overruled by Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). The Government has also recognized the long line of cases from this Court holding that "special procedural protections often attach to individuals, including suspected offenders, only after they are accused" of a crime. Draft Memorandum from Assistant Attorney General Jack Goldsmith to Alberto Gonzales, (Mar. 19, 2004), in *The Torture Papers* 379 (Karen J. Greenberg & Joshua L. Dratel eds.) (citing U.S. Const. amend. VI; *United States v. Ash*, 413 U.S. 300, 321

(1973) (Stewart, J., concurring); *United States v. Gouveia*, 467 U.S. 180, 189 (1984); and *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). And the Government agrees that this "distinction between those who are and are not accused makes eminent sense." *Id.* Indeed, in this very case the Government has implicitly acknowledged that trial and punishment by a military commission give rise to greater rights of judicial review than detention alone. *See* Br. for the Respondents in Opposition to Cert., *Boumediene v. Bush*, No. 06-1195, at 13.[3]

Because trial by commission raises more serious concerns than even indefinite detention for at least four reasons, individuals subject to the former have an even stronger case for habeas review than those facing the latter.

First, whereas detention is a military function that serves national security goals, punishment is a judicial function that serves the goals of justice. The Government has repeatedly argued that this Court must defer to the President on matters of detention because detention serves military purposes. *See, e.g.*, Br. of Respondent at 4, *Rasul v. Bush*, 542 U.S. 466 (2004) ("[D]etention serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and prevent additional attacks."); Br. of Respondent at 15, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) ("The detention of captured enemy combatants serves vital military objectives. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies.") (citations omitted). The Government has, in fact, gone to great lengths to distinguish detention from punishment – which is not a military but a judicial function. *See id.* at 15-16 ("The detention of captured combatants during an ongoing armed

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[3] *See also Hamdi*, 542 U.S. at 593 (Thomas, J., dissenting) (drawing the "punishment-nonpunishment distinction"); *Amicus* Br. of the Military Attorneys Assigned to the Def. in the Office of Military Commissions, *Al Odah*, No. 03-343, at 5-7; *Yamashita*, 327 U.S. at 30 (Murphy, J., dissenting) ("[T]he obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably.").